

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

VNUE, INC.,

Plaintiff,

v.

LG CAPITAL FUNDING, LLC., JOSEPH
LERMAN, BORUCH GREENBERG, and
DANIEL GELLMAN,

Defendants.

ORDER

No. 22-cv-3524-NRM-SJB

NINA R. MORRISON, United States District Judge:

On January 12, 2024, Judge Bulsara issued a Report and Recommendation (“R&R”), ECF No. 31, recommending that the Court deny Defendants’ motion to dismiss, ECF No. 25. This Court has reviewed the R&R, the Amended Complaint, ECF No. 24, the motion papers, ECF Nos. 25–30, Defendants’ objections to the R&R and Plaintiff’s response, ECF Nos. 32–34, and applicable law.

Defendants raise various objections to the R&R in their filings before this Court. First, Defendants urge this Court to reject Judge Bulsara’s recommendation and grant the motion to dismiss by reasserting various arguments and claims that they raised (without success) before Judge Bulsara. *Compare* ECF No. 27 at 4–7 *with* ECF No. 32 at 8–9; *compare* ECF No. 27 at 7–9 *with* ECF No. 32 at 9–10; *compare* ECF No. 27 at 10–14 *with* ECF No. 32 at 10–11. Having reviewed these contentions and claims in support of Defendants’ motion to dismiss *de novo*, the Court finds that they are without merit. Additionally, relying on *DarkPulse, Inc. v. Firstfire Global Opportunities Fund, LLC*, No. 21 Civ. 11222, 2023 WL 199196, 2023 U.S. Dist. LEXIS

7874 (S.D.N.Y. Jan. 16, 2023), Defendants urge this Court to find that Nevada law governs the parties' convertible note and that the Amended Complaint should be dismissed because Nevada law (if applicable) does not have laws against usury, unlike the New York law relied upon by Plaintiff here. However, Defendants' contention is foreclosed by the Second Circuit's recent decision partially vacating the relevant portion of *Firstfire* upon which Defendants rely. *See DarkPulse, Inc. v. FirstFire Glob. Opportunities Fund, LLC*, No. 23-78, Summary Order, March 28, 2024.¹

Finally, Defendants raise new arguments in their objections concerning Plaintiff's allegedly defective interest rate calculation² that were not presented to Judge Bulsara. This Court will not consider such contentions where, as here, they were not raised before the Magistrate Judge. *See Piligian v. Icahn Sch. of Med. at Mount Sinai*, 490 F. Supp. 3d 707, 716 (S.D.N.Y. 2020) ("New arguments and factual assertions cannot properly be raised for the first time in objections to the [R&R], and indeed may not be deemed objections at all") (internal quotation omitted).

¹ The Second Circuit's decision partially vacating and remanding *Firstfire* was issued after Judge Bulsara issued the R&R.

² Defendants make two new arguments in their objections to the R&R to support their claim that the interest rate calculation in the Amended Complaint is flawed. First, Defendants argue that Plaintiff's interest rate calculation "is only accurate where the lender converts 100% of the debt into stock for every transaction" but that Plaintiff failed to state a claim because "the amended complaint does not allege that LG converted 100% of Plaintiff's debt to stock for the subject transaction or that LG converts 100% of the borrower's debt to stock for all of its transactions." *See* Deft's Objections, ECF No. 32 at 8–9. Second, Defendants argue that "the amended complaint does not allege that at the time the loan was made LG intended to convert all debt into stock, nor is it alleged that LG generally intends to convert 100% of the debt owed on its loans into the borrower's stock. In the absence of these key allegations, which should not be presumed, Plaintiff fails to advance a viable calculation of an interest rate sufficient to support a civil RICO claim for collection of an unlawful debt." *Id.*

The Court agrees with the findings and recommendations in Judge Bulsara's well-reasoned and thorough R&R in their entirety, and concludes that Defendants' motion to dismiss should be denied. It is hereby ordered that the R&R, ECF No. 31, is ADOPTED in its entirety, with Defendants' motion to dismiss, ECF No. 25, DENIED in its entirety.

SO ORDERED.

/s/ NRM

NINA R. MORRISON

United States District Judge

Dated: March 30, 2024
Brooklyn, New York